EASTERN OCEANIC CORPORATION LTD. v. ORCHARD FURNISHING HOUSE BUILDING COMPANY.

[F.C. (Barakbah C.J. (Malaya), Wee Chong Jin C.J. (Singapore) and Wylie C.J. (Borneo)) August 24, 1965]

[Singapore — Federal Court Civil Appeal No. 102 of 1964]

Contract — Building contract — Housing development — Construction — Declaration of indemnity in respect of possible claims by third parties in respect of breach of contract.

The appellants had undertaken the development of a large housing estate. The development included the construction of septic tanks and the requisite sewerage mains to serve the estate and also of roads. The respondents agreed to buy thirty-three lots in the estate. The points in issue were (a) who should construct the sewerage mains necessary to convey the sewerage from eight houses in the estate to the septic tank; and (b) the standard to which the roads on the estate should be constructed. The trial judge held that it was the duty of the appellants to construct the sewerage mains and that the roads should be so constructed as to enable them to be taken over as public roads. At the trial the respondents asked for a declaration that the appellants should indemnify the respondents in respect of any loss resulting from future claims of damages by the purchasers of the houses because of the appellant's failure to construct the roads to the necessary standard and to provide the sewerage mains. The trial judge refused to make this declaration. On appeal,

Held: (1) on the construction of the agreement between the parties the trial judge was right in holding that it was the duty of the appellants to construct the sewerage mains and to construct the roads to the required standard to enable them to be taken over as public roads;

(2) as no claims had been made against the respondents by the purchasers of the houses the application for a declaration for indemnity against damages arising from such possible claims should be reserved with liberty to apply.

Cases referred to:—

(1) *Household Machines Ltd.* v. *Cosmos Exporters Ltd.* [1947] K.B. 217.

(2) *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.* [1952] 2 K.B. 297.

FEDERAL COURT.

J. Grimberg for the appellant.

Harry L. Wee for the respondent.

Wylie C.J. (Borneo): There are two points in issue in this appeal. The first is a dispute as to who should provide the sewerage mains necessary to lead refuse to a certain septic tank. During the hearing of the appeal, there was a certain amount of confusion as to whether the dispute was concerned with the connections to be made between an individual house and a sewerage main, or whether it concerned the construction of the sewerage mains themselves. It is now common ground that the dispute is as to who should construct the sewerage mains necessary to convey the sewerage from eight houses to a certain septic tank and not with the cost of connecting each of these houses with the main once the latter is constructed. This septic tank was a second tank to be constructed on a housing estate because the first tank has proved inadequate.

The facts show that the appellant undertook the development of this large housing estate. The development included the construction of a septic tank and the requisite sewerage mains to serve the estate. By an agreement for sale and purchase dated 4th January, 1962, the respondent agreed to buy thirty-three lots in that estate. The plan produced shows that the estate included many more lots than those sold to the respondent, and also other land. The sewerage mains shown on the plan include mains running over land not sold to the respondent (but in some cases serving lots that were sold to the respondent) and the agreement for sale and purchase does not give the respondent any easement over, or indeed any right at all in respect of, any land other than that purchased. If that had remained the position, there would be an overwhelming inference that the parties intended that the appellant would go on to complete the development of the estate so far as the general services are concerned, including sewerage mains.

The agreement for sale and purchase confirms this inference in several respects because there are specific provisions putting responsibility on the appellant in regard to completion of roads, provision of services for water, gas and electricity and the supply of a larger septic tank on account of the fact that the septic tank already erected was inadequate. Moreover, the purchaser undertook that, upon the vendor obtaining City Council approval of building plans, the purchaser would cause houses to be erected on all thirty-three lots, and undertook to sell all the lots to sub-purchasers upon terms similar to those already entered into by purchasers of houses to be erected on the estate. Clearly, the respondent could not fulfil its obligations under these agreements with sub-purchasers unless the development of the housing estate was completed, at least in respect of the requirements of public authorities which would need to be satisfied to render sale and occupation permissible in respect of the lots purchased. The only party to the agreement that had authority to go on to the other land in the estate and complete this development was the vendor. There is therefore a strong inference that the parties' common intention was that the vendor should complete development generally in order that the purchaser could carry out its obligations.

The appellant did not really dispute this aspect. Indeed, settlement of other matters in dispute and concessions made by the respondent in the course of the trial show that the appellant accepted that, generally speaking, it was under

an obligation to complete development. In regard to the sewerage mains for these eight houses, however, the appellant contends that the terms of the agreement, in the events that occurred, do not place this obligation on the appellant.

These events concern the necessity for a larger septic tank. In the agreement there is a recital to the following effect:—

"AND WHEREAS there is at present erected on the site of the building estate a septic tank to serve the needs of the buildings to be erected on the estate but as such septic tank will be inadequate to serve the needs of the buildings to be so erected, it will be necessary to erect another septic tank of 400 capacity (hereinafter called "the Second Septic Tank") for that purpose."

This recital does not state who is to build the second tank. Apparently, before it was built, the appellant sold out most of its interest in the balance of the estate to the New City Realty Ltd. The only witness called for the defence was an architect who was instructed by this company to erect the new tank, which was under construction at the time of the hearing in September, 1964. He stated that, for the tank to be put into effective use, a minor sewerage scheme must be put in to connect the houses and that such a scheme would normally be worked out before construction of the tank, but that this was not done in this case. In cross-examination he stated that normally the "developer" employed him and that it is unusual for individual householders to run their own sewerage pipe to the septic tank. The plan shows that the eight houses concerned are a considerable distance from the new septic tank and that the sewerage mains that are laid near to these houses lead to the original septic tank to which, it was stated during the hearing of the appeal, the authorities refuse to allow more houses to be connected because it will become overloaded. Consequently, the connection of these eight houses to the new tank will involve the construction of a very lengthy main, which will no doubt involve a great deal of expense and will have to be laid over land over which apparently the respondent has no right to construct mains. Nor is there any evidence that the appellant has reserved the right to construct mains over the land now sold by it. Perhaps it is this situation that has led to the dispute as to responsibility for this sewerage main.

For the appellant, it was contended that the following features of the agreement led to the inference that this was not intended by the parties to be the responsibility of the appellant.

First, the recital set out above shows that the parties were aware that a new septic tank was necessary, but the specific subject of mains is not referred to in the agreement. Consequently, there is no express provision placing the responsibility in regard to mains on the appellant, although the need for a new septic tank was contemplated and responsibility for the tank itself is placed on the appellant by the terms of the agreement. Consequently, the failure to place any responsibility expressly on the appellant in respect of the mains, it was contended, shows that the true interpretation of the agreement was that the parties had no intention that this work should be done by the appellant. In support of this argument, attention was drawn to specific provisions in the agreement putting responsibility on the appellant for the erection of the new tank itself and for the re-doing of certain roads and for the retention by the purchaser of specific sums from the purchase price pending the completion of these works by the appellant, and providing that the appellant shall pay any excess of the cost over and above the amount retained. The agreement also specifically referred to the intention of the appellant to provide water, gas and electricity services to the estate and the purchase price for the thirty-three lots was expressly calculated in the agreement by including the cost of providing these services, clearly expressing the intention of the parties that the appellant had to pay for the provision of these services. Also relevant to this agreement are two clauses which appear to have been added after the agreement was first drafted. Clause 13 imposes on the appellant, with certain safeguards, the cost of certain piling, if this work proves necessary, and clause 14 records that the sewerage "line" (which I assume to be the same as a sewerage main) had not been completed to serve lots 9, 10 and 11 (which are not three of the eight lots concerned in this dispute) and the appellant agreed to complete this "line" by 28th February, 1962.

The features of the agreement which have been pointed out, are undoubtedly examples of points that did come within the contemplation of the parties and were therefore provided for. They also indicate that the parties intended the agreement to be a complete record of the terms of the bargain. In my view, the real issue is whether the provision for construction of the new septic tank was intended to include the construction of mains necessary to the proper functioning of the new tank for the purpose for which it was intended. It is contrary to reason to suggest that the parties contemplated the construction of a new tank, but not the construction of whatever mains were required for this purpose. As the defendant's own witness stated, the tank could not be put to effective use without a "sewerage plan". It must have been intended that these mains should be constructed and, at the time the agreement was entered into, only the appellant had legal authority to go on the relevant land and construct them. This feature, coupled with the failure to provide in the agreement for any easement or other authority to the

respondent for this purpose, clearly indicates an intention that the appellant was to do this work, presumably as part of the construction of the new tank. This conclusion would also be in accordance with the general inference that the parties contemplated that the appellant would complete the development of the housing estate, at any rate to the point where the respondent could fulfil its obligation under the agreement to build houses on the lots purchased and sell them.

It may be that, in January 1962, it was thought that the existing sewerage mains scheme could be used for the second tank also and that it only transpired subsequently that a completely new line from distant sections would be necessary. If that is so, that cannot affect the parties' rights and obligations, although it may put the appellant to additional expense. Indeed the agreement expressly provides that the appellant must pay any excess by which the cost of completion of the second tank exceeds the amount retained. As I have said, the connecting up of the second tank to the sewerage scheme is, in my view, part of that work and therefore to be included in the cost. The judgment of the court below on this issue should stand.

The other point in dispute in this appeal concerns the standard to which the roads should be constructed or altered — whether, to quote from the judgment of the High Court, —

"(a) to the standard required to enable certificates of fitness for occupation to be issued; or

(b) to the higher standard required to enable them to be taken over as public roads."

The appellant contended he was obliged to construct the roads only to the lower standard, while the respondent contended that the higher standard was applicable.

The agreement is not very helpful. It recites that the roads "have not been constructed according to the requirements of the Public Works Department" and will have to be "re-done or altered so as to comply with such requirements". Clause 7 provides for the retention by the purchasers of the sum of $15,000 until "the redoing or alteration of the estate roads". For the appellant the point was made that the sum retained was so much less than the cost of the higher standard that this higher standard could never have been contemplated by the parties. The force of this point is considerably blunted by the further provision that the appellant is to pay any excess over and above the amount retained, a feature that is repeated in the letter to which I am about to refer.

In the agreed bundle of correspondence is a letter dated 11th April, 1962, from the respondent to the appellant's managing director which records points agreed at a meeting that morning "with regard to the original agreement". Item (1) deals with the sum of $15,000 retained in respect of the roads and reads as follows:—

"The construction of the footpath is to be resumed and done according to City Council standards but the Orchard Furnishing House shall release funds for the purpose in progress payments not exceeding $9,000. Any extra amount needed shall be paid direct by the Eastern Oceanic Corporation. The remaining amount of the retention money, totalling $6,000 shall be reserved for the repair and improvement of the road surface and drains when and if the City Council requires it for taking over the roads. Should the addition of premix not be required for the City Council to take over the roads, the Orchard Furnishing House Building Company agrees to pay the remaining $6,000 direct to the Eastern Oceanic Corp."

On 12th April, appellant replied confirming that "your letter correctly records the agreement reached at our meeting", subject to clarification of an item that does not concern the roads.

In the light of the two references in that letter to the requirements of the City Council for taking over the roads, and especially to the agreement to release a certain sum if the City Council did not require certain work done for that purpose, the inference is overwhelming that, in the original agreement made only three months before, the reference to the requirements of the Public Works Department (which at the hearing of this appeal it was explained had taken the place of the City Council) must have been intended as a reference to what was required to take over the roads, and not to the lower standard required for the issue of certificates of occupation. On this point also, the judgment of the court below should stand.

The appellant has also contested the order of the High Court reserving certain heads of damages with respect to the appellant's failure to construct the roads to the necessary standard and to provide sewerage mains to serve the eight houses. The appellant contends that it would be more appropriate to order the appellant to indemnify the respondent in respect of any loss they may suffer from the appellant's defaults. The loss envisaged is loss that may result from claims for damages made against the respondent by purchasers of the houses because of the failure so to construct the roads or to provide the relevant sewerage mains. It is conceded that, if the appellant is in breach of its obligations in respect of these matters, it may be obliged to indemnify the respondent in respect of any such claims made. There is no evidence that any claims are made or intended at present, and therefore it is not possible at this juncture to state what the nature of those claims might be. The appellant relied upon *Household Machines Ltd.* v. *Cosmos Exporters Ltd.*[1] where Lewis J. granted a declaration that the aggrieved party was entitled to recover from the other party "such damages as are due in law" in respect of damages which the former might have

to pay to a third party in consequence of the other party's breach of contract. In that case, the third party had already made a claim, but the amount was liable to be increased because of possible claims on the third party by sub-purchasers.

The respondent relied upon *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.*[2] which was followed by the High Court in reserving this head of damages. In that case, Somervell L.J. and Denning L.J. disapproved a declaration of indemnity in respect of a possible claim by a third party who had not at that juncture made a claim. Somervell L.J. pointed out that, when the stage was reached when a precise claim could be made by the plaintiff against the defendant, difficult questions might arise depending on differences in the contracts between plaintiff and defendant as compared with those made between the plaintiff and the third party (a relevant consideration in the present case) and on such questions as the obligation of the third party to mitigate damages. Logic is on the side of the views expressed by Somervell L.J. and Denning L.J. that the issue should be reserved with liberty to apply for directions when the real issues can be determined and damages quantified. The order of the High Court should therefore stand. Presumably, the situation in regard to claims by third parties should soon be clarified once the work to be completed by the appellant has been done.

For the appellant, it was pointed out that there was an order made in these proceedings empowering the sheriff to seize appellant's share in New City Realty Ltd., the purchaser of the balance of the estate, and it was suggested that this order might be discharged if proceedings were concluded by a final judgment. The judge in the High Court considered the question of discharging this order at this stage and his refusal to do so was not challenged on appeal. The existence of this order is not, in these circumstances, a relevant consideration for this court in determining whether the issues in question should be reserved.

I would dismiss this appeal with costs.

Barakbah C.J. (Malaya) and Wee Chong Jin C.J. (Singapore) concurred.

Appeal dismissed.

Solicitors: *Drew & Napier; C. J. Koh & Co.*

ENG KEOCK CHENG v. PUBLIC PROSECUTOR

[F.C. (Barakbah C.J. (Malaya), Wylie C.J. (Borneo) and Tan Ah Tah F.J.) August 25, 1965]

[K.L. — Federal Court Criminal Appeal No. 16 of 1965]

Constitutional Law — Delegation of power — Emergency — Whether Parliament can delegate power to legislate — Federal Constitution, arts. 8 and 150.

Criminal Procedure — Trial without preliminary inquiry and without a jury — Validity of Emergency (Criminal Trials) Regulations, 1964 — Declaration that regulation valid despite inconsistency with any written law — Whether "written law" includes the Constitution — Emergency (Essential Powers) Act, 1964 — Criminal Procedure Code (Cap. 6), ss. 138 and 200.

Legislation — Emergency — Delegated legislation — Validity of.

The appellant had been convicted for offences under section 57(1)(a) and (b) of the Internal Security Act, 1960, and sentenced to death. On appeal it was argued (1) that the trial court had no jurisdiction to try the offences of which the appellant was charged and convicted by reason *inter alia* of (a) the absence of any preliminary inquiry as required by section 138 of the Criminal Procedure Code; (b) the absence of a jury as required by section 200 of the said Code, (2) that the procedure adopted by the learned trial judge for the trial was a procedure appearing in the Schedule of the Emergency (Criminal Trials) Regulations, 1964, being seemingly the procedure referred to in regulation 4 thereof, which regulation 4 in so far as it purports to authorise any one of the many deputy public prosecutors to deprive a man charged with a capital offence of the protection of a preliminary inquiry and of a jury is *ultra vires*.

It was argued for the appellant that although it was recited in the Emergency (Essential Powers) Act, 1964, that any regulation made under it shall have effect notwithstanding anything inconsistent therewith contained in any written law other than the Act, this did not authorize the making of regulations inconsistent with the Constitution as in the circumstances the words "written law" in the Act could not include the Constitution. Alternatively it was argued that Parliament had exceeded its powers by purporting to delegate to the Yang di-Pertuan Agong power to enact regulations inconsistent with the Constitution.

Held: (1) the true effect of article 150 of the Federal Constitution is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved; and that this necessarily included authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution;

(2) the provisions of the Emergency (Essential Powers) Act, 1964, are not beyond the power of Parliament to enact and as Parliament has expressly enacted that regulations made under the Act are to be valid notwithstanding any inconsistency with the provisions of the Constitution, such regulations cannot be challenged on the ground of any such alleged inconsistency;

(3) on the facts the appellant was rightly convicted and therefore the appeal must be dismissed.

FEDERAL COURT.

Dato' David Marshall for the appellant.

B. T. H. Lee (Senior Federal Council) for the respondent.